

Date: July 31, 1996

CASE No.: 94-ERA-24

In the Matter of

WILLIAM F. JOCHER  
Complainant

v.

TENNESSEE VALLEY AUTHORITY  
Respondent

APPEARANCES:

Charles W. VanBeke, Esquire  
Wagner, Myers & Sanger  
For the Complainant

Thomas F. Fine, Esquire  
Philip J. Pfeifer, Esquire  
Brent R. Marquand, Esquire  
Tennessee Valley Association  
For the Respondent

BEFORE: ROBERT L. HILLYARD  
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

This proceeding arises out of a complaint of discrimination filed pursuant to Section 210 of the Energy Reorganization Act of 1974, as amended, 42 U.S.C. Section 5851, et seq., (hereinafter ERA). The implementing regulations are found at 29 C.F.R. Part 24. The ERA affords protection from employment discrimination to employees in the nuclear industry who commence, testify at, or participate in proceedings or other actions to carry out the purposes of the ERA or the Atomic Energy Act of 1954, as amended 42 U.S.C. Section 2011, et seq. The law is designed to protect "whistleblower" employees from retaliatory or discriminatory actions by the employer.

A formal hearing in this case was held in Knoxville, Tennessee, from May 9, 1995 to May 18, 1995. Each of the parties was afforded full opportunity to present evidence and argument at the hearing as provided in the Act and the regulations issued thereunder. The findings and conclusions which follow are based

upon my observation of the appearance and the demeanor of the witnesses who testified at the hearing, and upon a careful analysis of the entire record in light of the arguments of the parties, applicable statutory provisions, regulations, and pertinent case law.

### I. STATEMENT OF THE CASE

William F. Jocher (Jocher or Complainant) filed a complaint with the Wage and Hour Division, Employment Standards Administration on June 29, 1993, alleging that he had been forced to resign as a result of his reporting of safety concerns relating Tennessee Valley Association's (TVA) chemistry program (ALJX 1).<sup>1</sup> The Area Director of Wage and Hour Division, Employment Standards Administration conducted an investigation and on April 29, 1994, issued a decision in favor of the Complainant. Id. On May 3, 1994, Respondent appealed that decision and requested a hearing before the Office of Administrative Law Judges (ALJX 2).

### II. ISSUES

1. Whether the Complainant's resignation was voluntary;
2. Whether TVA demonstrated legitimate, non-pretextual reasons for seeking the Complainant's resignation; and
3. Whether TVA discriminated against the Complainant as a result of his reporting of safety concerns relating to TVA's chemistry program, in violation of the Act.

### III. STIPULATIONS

The stipulations are incorporated into the Factual Background Section and the Findings of Fact Section. They are contained in ALJX 39.

### IV. FACTUAL BACKGROUND

#### A. Jocher's Work History and Educational Background

The Complainant, William Jocher, began his career in the utility industry in the mid-1960's as an equipment operator at a Public Service Electric & Gas fossil fuel plant. Jocher was later transferred to the test department, where he learned how to repair, maintain and calibrate instruments, as well as conduct laboratory analyses (CX 2, Tr. 27-29). Public Service Electric & Gas

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<sup>1</sup> In this decision, "CX" refers to the Complainant's Exhibits, "RX" refers to the Respondent's Exhibits, "ALJX" refers to the Administrative Law Judge's Exhibits and "Tr." refers to the Transcript of the hearing.

announced the building of its Salem Nuclear Generating Station, and in October of 1972 Jocher began working at the Station as an instrument technician, health physics (radiation protection) technician and chemistry technician (CX 2, Tr. 28). Beginning in 1979, Jocher began working for the Seabrook Nuclear Power Plant as a plant chemist (CX 2, Tr. 29). A year later, Jocher took a job as a senior engineering assistant at the Three Mile Island Nuclear Power Plant, responsible for restructuring and developing the chemistry department in the wake of the Plant's accident (CX 2, Tr. 32). Jocher returned to the Salem Nuclear Generating Station in 1981, serving as senior supervisor and acting head of the department of health, physics and chemistry - a position analogous to chemistry manager at other nuclear facilities. Id. Beginning in 1983, Jocher worked for the Pennsylvania Power & Light Company Susquehanna Steam Electric Station as a senior chemist (CX 2, Tr. 36). In 1986, Jocher took a job at Georgia Power Company Vogtle Electric Generating Plant as a radiochemistry supervisor (CX 2, Tr. 41). From 1987 to 1990, Jocher worked at Houston Lighting & Power Company South Texas Project as a chemistry support general supervisor. Id.

Jocher's work history familiarized him with the two types of nuclear reactors in the United States - pressurized water reactors and boiling water reactors. His work history also gave him experience in the technical chemistry issues specific to nuclear power plants as well as an overall understanding of the workings of a nuclear power plant. Jocher co-authored a number of papers addressing issues facing the nuclear power industry and presented them at industry meetings (CX 5, 6, 7). These factors, along with Jocher's extensive work experience, led TVA to hire him in November of 1990 for the position of Manager, Chemistry and Environmental Protection, in its corporate nuclear office.

Jocher received his degree in Professional Studies from Elizabethtown College in January of 1990 (CX 1). In his TVA employment application, Jocher represented that he attended Elizabethtown for four years, earning a 3.0 grade point average. In fact, Jocher attended Elizabethtown over a period of eight years and also attended six other colleges and universities over twenty-eight years (RX 45, Tr. 343-44). Elizabethtown awarded Jocher his degree based upon academic credits accumulated at Elizabethtown, previously earned academic credits from other colleges and universities, and credits awarded for on-the-job experience (Tr. 361). Jocher's transcripts, which included all of the colleges and universities he attended, do not support a 3.0 grade point average (RX 45). In an employment application filled out in 1994, Jocher represented that he majored (32 credits) in nuclear chemistry (RX 43). Jocher's transcripts do not show 32 hours/credits of chemistry classes (RX 45).

B. Jocher's Tenure at TVA Corporate - November 1990 to March 1992

On November 26, 1990, Jocher was hired by TVA in its Office of Nuclear Power as Manager, Corporate Chemistry and Environmental Protection (TVA corporate) (ALJX 39). Jocher's position was classified as Grade PG-10 on TVA's Management and Specialist Pay Schedule.<sup>2</sup> At the time of Jocher's hiring, TVA had three operating nuclear units at two sites (Sequoyah and Browns Ferry) and two sites (Bellefonte and Watts Bar) with units under construction (Tr. 63, 1347). Jocher's role as corporate chemistry/environmental manager was to provide technical support and assistance to the sites as well as provide information on program issues to corporate management (CX 9). The Sequoyah, Browns Ferry and Watts Bar facilities each had their own chemistry and environmental staffs.

Jocher's technical skills were highly regarded. As discussed, Jocher came to TVA with extensive experience in nuclear chemistry. James Barker, who hired Jocher and was his first supervisor at TVA, testified that he was very impressed with the technical skills Jocher had built up over the years (Tr. 468). Donald Vetel of Nuclear Utility Services (NUS), a nuclear consulting firm, worked with Jocher both prior to and after Jocher began working at TVA and testified that he would rate Jocher very high from a technical standpoint (Tr. 678-680). Patrick Lydon, corporate operations manager at TVA who supervised Jocher for approximately seven months, testified that Jocher was technically sound (Tr. 615). Dr. William McArthur, TVA's Manager of Technical Support and one of Jocher's supervisors, testified that Jocher was a very strong technical person and wrote in Jocher's September 8, 1992 employee appraisal that his strengths included technical knowledge and experience (Tr. 1093, 1101, CX 14, ALJX 39). Robert Beecken, plant manager at Sequoyah when Jocher was at TVA corporate, said that he was impressed with Jocher's knowledge in the nuclear chemistry field (Tr. 1253).

Some of the tasks that Jocher undertook at TVA corporate included promoting the adoption of a hydrogen water chemistry plan at Browns Ferry, recommending a treatment plan for Browns Ferry's main surface condenser, and developing a corporate chemistry manual to promote uniformity across the site chemistry programs. (Tr. 61, 71, ALJX 39, CX 173).

While at TVA corporate Jocher interacted with numerous people from both the corporate office and the sites. Donald Matthews, the chemistry program manager at Watts Bar, testified that Jocher got along well with other team members and behaved professionally during staff meetings (Tr. 541, 546). Dr. E.S. Chandrasekaran, a senior chemistry and environmental specialist at TVA who worked with Jocher prior to joining TVA and was brought to TVA by Jocher,

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<sup>2</sup> Grade PG-10 is considered a high level position as it is the second highest grade on TVA's Management and Specialist Pay Schedule (ALJX 39).

testified that Jocher behaved professionally during staff meetings (Tr. 768-771, 778). Charles Hudson, manager of TVA's corporate radiological control group, testified that he had a good relationship with Jocher but had little knowledge of Jocher's dealings with others (Tr. 506, 511, 531). James Barker testified that he got along well with Jocher and was happy with the progress made at TVA corporate during Jocher's tenure (Tr. 475). Barker acknowledged that he did not have much opportunity to observe Jocher interacting with other managers and said that tension between corporate and site staffs had always been common (Tr. 488, 494).

Dr. Don Adams, chemistry program manager at Sequoyah, testified that while at TVA corporate Jocher had accused him of initiating a rumor that he (Jocher) had been demoted; Adams denied starting the rumor and Jocher later apologized to Adams for making the accusation (Tr. 1023, 1047-48). Adams told Wilson McArthur about the incident (Tr. 1049). Adams said that he did not trust Jocher, believing him to have a "get even" attitude (Tr. 1048-49). Betsy Eiford-Lee, a chemist and member of Jocher's corporate chemistry staff, testified that Jocher often interrupted staff meetings by placing phone calls<sup>3</sup> and contributed to the divisiveness in the meetings by favoring chemists over environmentalists<sup>4</sup> (Tr. 741-42, 747). Eiford-Lee spoke of one instance where Jocher inserted an unfavorable remark in her performance evaluation after she had signed it; she asked Jocher to delete the remark and he did (Tr. 747-48). Because she did not like working for Jocher, Eiford-Lee requested and was granted a transfer out of the corporate chemistry staff (Tr. 751).<sup>5</sup> David Sorrelle, a Senior Program Manager at TVA corporate who worked for Jocher, testified that Jocher disrupted corporate staff meetings by making "unwarranted

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<sup>3</sup> Dr. Chandrasekaran said that the phone calls were not disruptive (Tr. 776-77).

<sup>4</sup> Jocher's environmental responsibilities were eventually removed (RX 56, ALJX 39).

<sup>5</sup> Eiford-Lee also testified that after Jocher had been moved to Sequoyah the two clashed after she questioned Jocher's conduct during a nuclear plant emergency drill, stating that Jocher "essentially called [her] a liar" and made her feel that her career was "not going to go anywhere" in corporate chemistry. Eiford-Lee said that she reported Jocher's comments to Wilson McArthur (Tr. 749-753).

personal attacks" on people in the meetings, particularly the site chemistry managers<sup>6</sup> (Tr. 842-45).

Jocher had an uneasy working relationship with John Sabados, TVA's acting Chemistry Manager at Browns Ferry during the time that Jocher was at TVA corporate. Their problems started with the hydrogen water chemistry initiative at Browns Ferry, a program vigorously championed by Jocher. Sabados took offense to Jocher's aggressive campaigning, feeling that the program needed further review before it was ready for implementation<sup>7</sup> (Tr. 1518-1521, ALJX 39). Sabados also had a problem with the corporate chemistry manual, a Jocher project, believing the manual was unnecessary and "superfluous." (Tr. 1516). Jocher's recommendation of a treatment plan for Brown Ferry's main surface condenser was initially opposed by Sabados (ALJX 39).

The above disagreements resulted in discord between Jocher and Sabados. Sabados testified that he felt Jocher was meddling with the sites, giving orders rather than offering support (Tr. 1093, 1116, 1212, ALJX 39). Jocher testified that the two had a "rocky

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<sup>6</sup> Sorrelle also alluded to an incident that occurred after Jocher transferred to Sequoyah. He testified that in the late fall of 1992, after an anonymous phone call had been made to the State of Tennessee, Jocher notified him of a diesel oil spill occurring at Sequoyah (Tr. 853-54). Sorrelle believed that Jocher knew about the incident beforehand because when he (Sorrelle) arrived on the scene, cleanup work had already begun under Jocher's direction (Tr. 854-56). Sorrelle said that if Jocher had notified TVA environmental sooner, rather than having the problem come to light via an anonymous phone call, TVA could have mitigated their resulting credibility problems with the State of Tennessee, who issued a Notice of Violation to TVA after learning of the spill through the anonymous phone call (Tr. 859). Sorrelle said that he believed Wilson McArthur was apprised of the incident. Id. For his part, Jocher testified that the digging began before he knew of the spill and that he alerted TVA environmental the moment he became aware of the spill. Jocher denied issuing cleanup instructions, saying that any instructions to dig were issued by Pat Lydon, Sequoyah's site operations manager (Tr. 1635-37). Jocher's account of the incident does not comport with a September 21, 1992 memorandum signed by him, which contains his proposal for cleanup of the spill; Lydon is copied on the memorandum (CX 90). Lydon, who testified at the hearing, was not questioned about the spill.

<sup>7</sup> Sabados was concerned that the program would result in increased radiation exposure (Tr. 1519). A "blue ribbon" study group was formed to study the feasibility of the project. The study group eventually recommended implementation of the program (ALJX 39).

relationship" and that Sabados did not take well to suggestions from TVA corporate (Tr. 71). David Sorrelle testified that he overheard what he believed to be a phone conversation Jocher was having with a manager from another power plant concerning the mental stability of Sabados (Tr. 847). Sorrelle told Sabados about the phone call and Sabados became upset, believing that Jocher was attempting to remove him from TVA (Tr. 847, 1522). Jocher testified that he called Sabados' former supervisor for advice on dealing with Sabados (Tr. 72); Jocher said that Sabados' former supervisor broached the subject of Sabados' mental stability, not him (Tr. 1642).

This incident led to a meeting attended by Wilson McArthur, Jocher, Sabados and Max Herrel, Sabados' supervisor at Browns Ferry. At the meeting, Jocher and Sabados discussed their differences and agreed to work professionally together (Tr. 72, 1521-23, ALJX 39). Jocher testified that he felt the meeting went fine and he had no further problems with Sabados (Tr. 72-73). Sabados testified that he remained leery of Jocher and did not like working with him (Tr. 1523).

The two crossed paths again after Jocher's assignment to Sequoyah. Jocher did not support Sabados' nomination as permanent chemistry manager at Browns Ferry (Tr. 1524, 1534-35, ALJX 39). And during a meeting in which Sabados offered Jocher constructive criticism, Jocher responded that he hoped to be able to "repay the favor." (Tr. 1527-28, ALJX 39). Sabados felt that the remark could be taken two ways and chose not to take any affront to Jocher's remark (ALJX 39). In May 1992, McArthur talked to Sabados and McArthur understood that Sabados was not happy with Jocher about some issue. Jocher recalls that the issue may have involved his proposal to combine site chemistry and health physics into a single radcon organization. McArthur told Jocher what Sabados had said. McArthur recorded that Jocher intended to develop better rapport with Sabados and be a team player (ALJX 39, RX 12).

Jocher received an overall favorable performance review for his work at TVA corporate. The report read that Jocher "has met all his goals in a timely, professional manner. He and his staff have technical credibility with corporate and site organizations and have worked to establish a good team relationship." (CX 12). It was also noted that Jocher's "rapport with the site managers is established" and that "Mr. Jocher has provided leadership and solid technical direction to corporate and site chemistry." Id. The report noted that Jocher needed to place additional emphasis on delegation and meeting administrative commitments. Id. Jocher received a \$3,800.00 performance based bonus that year (Tr. 279-280, CX 108).

C. Jocher's Assignment to Sequoyah

One of Jocher's duties while at TVA corporate was to prepare an assessment of Sequoyah's chemistry program (Tr. 100-01, CX 38, ALJX 39). Part of the assessment involved reviewing previously identified problems at the site, identified by the Nuclear Manager's Review Group (NMRG), Operational Readiness Review (ORR), Institute of Nuclear Power Operations (INPO) and Quality Assurance (QA)<sup>8</sup> (Tr. 75). Jocher's review revealed a number of problems at Sequoyah, including: unreliable equipment, problems with procedural compliance, operational readiness, post-accident sampling procedures; training deficiencies at the shift personnel, technician and supervisor levels; improper labeling of chemicals; and unfulfilled work requests (CX 162, 163, 164, 166, 167, 168, 170, 171). Most of these problems, while for years known to exist, still prevailed (Tr. 122, 134, 139, 147). Jocher summarized the problems in a report titled the "Chemistry Improvement Plan" and presented his findings to TVA management (Tr. 101, CX 38).

At about the same time, Gary Fiser, Sequoyah's then acting Chemistry Manager, was ready to return to TVA corporate - leaving the Sequoyah chemistry manager position open (ALJX 39). Since Jocher had studied and reviewed the Sequoyah chemistry program, TVA management felt that Jocher was the right person to cure Sequoyah's ailing chemistry program and proposed that he assume the site's chemistry manager position; Jocher agreed and the assignment was made in February of 1992.<sup>9</sup> Id. As a condition to the assignment Jocher received assurance that, unless otherwise agreed to, he would return to corporate in one year. Id. Dan Keuter, TVA's Vice President of Operational Services, impressed upon Jocher that his assignment to Sequoyah provided him an opportunity to build credibility by showing that he could solve problems at the site level. TVA management expected Jocher to "put his money where his mouth was." Id.

D. Jocher's Tenure at Sequoyah

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<sup>8</sup> NMRG, ORR and QA are internal TVA "watchdog" groups, created to identify and assess problems at the sites. INPO is an industry-wide consulting group created for the same purpose.

<sup>9</sup> Prior to his arrival at Sequoyah and again shortly after he arrived, Jocher issued questionnaires to all Sequoyah Chemistry personnel in order to identify issues that troubled them. Some responded anonymously and some signed their responses. There were a number of morale, management, personnel, training, and communication issues reported which pre-existed Jocher's arrival at Sequoyah (ALJX 39).



Upon arriving at Sequoyah, Jocher continued to identify problems. Many of them involved out of service equipment, including radiation monitors, chlorination systems, condenser vacuum exhaust monitors and on-line monitors (Tr. 166-174, CX 55B-F). All totalled, the Chemistry Improvement Plan evolved during Jocher's tenure at Sequoyah from approximately 65 items to over 120 items (ALJX 39).

Jocher commenced efforts to improve the Sequoyah chemistry program. He solicited feedback from the chemistry personnel in the form of an anonymous questionnaire. The responses revealed the existence of a number of morale, management, personnel, training and communication issues at the Plant (ALJX 39). In an effort to improve the chemistry program, Jocher instituted a number of accountability measures. He outlined tasks to be completed by his shift supervisors and lab technicians, providing a time frame for completion (Tr. 82, CX 37, 37A). Technicians were provided with binders to note assignments and document their progress (Tr. 82-83, CX 40). Jocher prepared a list of daily minimum expectations for the technicians and shift supervisors (Tr. 85, 87-88, CX 4, 45). To combat the problem of out of service equipment, technicians were required to monitor their use of instruments in an analyst log book, ensuring that the instruments met quality assurance checks<sup>10</sup> (Tr. 87-88). As a motivational tool for the technicians, Jocher adopted the "Top Crew" program whereby he awarded peak performers by placing them on a straight day schedule rather than on rotating shifts (Tr. 90-93, CX 54). Jocher testified that his initiatives led to a reduction in the amount of reported errors, as documented in monthly chemistry reports (Tr. 95-101, CX 55D-J).

Another of Jocher's concerns when he arrived at Sequoyah was the technician's level of knowledge. As far back as 1988, deficiencies in the technician's level of knowledge had been documented in INPO, NMRG, ORR and QA audits (ALJX 39, Tr. 193-94,

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<sup>10</sup> Within several months of coming to work at Sequoyah, Joseph Bynum, TVA's vice-president of Nuclear Operations, asked Jocher to develop a new site chemistry organization chart for implementation at all sites. Jocher developed a plan to reorganize the chemistry group which he felt was consistent with senior management's directions on the proper ratio of direct reports to a manager. This would have impacted the position of a number of personnel, including the shift supervisors. Jocher recalls that Bynum, Sabados and Donald Matthews, the chemistry program manager at Watts Bar, agreed with the plan in principle. Sequoyah Human Resources and Bynum ultimately disapproved of the reorganization plan (ALJX 39).

1026-27, CX 78, 79, 168).<sup>11</sup> Prior to Jocher's tenure at TVA, as part of a reorganization, TVA discontinued using its central chemistry training laboratory for training and moved from a periodic to a continuous training program. INPO, NMRG, ORR and QA auditors had identified chemistry training as an area of concern, with unresolved open items questioning the systems and theoretical knowledge of the chemistry technicians. TVA chemistry technicians typically tested well in their areas of specialization, but not so well in areas in which they did not work. Many exhibited a lack of understanding of theoretical and fundamental nuclear plant chemistry issues (ALJX 39). Lawrence Durham, TVA's Nuclear Training Manager, testified that he did not believe the restructuring of TVA's training program had a significant negative impact on the technician's level of knowledge (Tr. 1481, 1485, 1489).

In an effort to assess the level of knowledge, Jocher administered a test to his shift supervisors and technicians (Tr. 184, CX 60). The test was not administered anonymously (Tr. 438). The scores on the test established a low level of theoretical knowledge in chemistry related matters<sup>12</sup> (Tr. 183). Jocher attempted to improve the technician's level of knowledge by initiating classes at the Sequoyah training facility. He taught some of the classes himself, calling them the "adjunct professor" program (ALJX 39).

The technicians were unhappy with the manner in which Jocher administered the test. Dan Keuter (TVA's Vice President of Operations Services) testified that the technicians were upset because the test was not administered anonymously and did not test pertinent knowledge (Tr. 944, RX 20). Keuter did not think it was appropriate for Jocher to require the technicians to include their names on the test because the purpose of the test was to obtain an overview of technician knowledge, not identify individual techni-

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<sup>11</sup> When Jocher was asked whether the technicians could safely continue to work, he said that as long as the technicians operated in their areas of specialization, and steps were taken to provide training, there was no need to take drastic action. Further, in the face of INPO's threat to revoke Sequoyah's chemistry training program's certification, Jocher assembled the documentation to defend the program and prepared TVA's representative for the presentation that was made to INPO. Subsequent to the presentation, INPO determined that Sequoyah's chemistry technician training program should keep its certification (ALJX 39).

<sup>12</sup> An incident occurring at the Sequoyah Plant involving a condenser leak illustrates this low level of knowledge. Chemistry technicians were unable to identify the source of the leak for 18-20 hours before Jocher was paged to come to the Plant; he located the leak (Tr. 108-111, CX 59).

cian weaknesses<sup>13</sup> (Tr. 946). Lawrence Durham (TVA's Nuclear Training Manager) also questioned Jocher's decision to require the technicians to identify themselves and, like Keuter, felt that the test's subject matter did not correlate with the technicians' training (Tr. 1493, 1498, 1500). Charles Kent, Sequoyah's Radiological Control Manager, testified that the test led to morale problems with the technicians (Tr. 1285). In Durham's opinion, Jocher intimidated the training program personnel (Tr. 1507-08).

The Nuclear Safety Review Board (NSRB)<sup>14</sup> eventually had the technicians retested, determining that the Jocher-administered test did not properly test the technicians' knowledge and asked improper follow-up questions (Tr. 945-46, 1496, RX 20). TVA's Training Programs Executive Committee (TPEC)<sup>15</sup> administered the new test in March of 1993; the test was taken anonymously (Tr. 1505, ALJX 39, RX 41, 62). The test was designed to assess the technicians' basic knowledge in maintenance, chemistry and radiation protection (Tr. 1501). The results of the test revealed weaknesses in the technicians' fundamental and theoretical knowledge (ALJX 39, Tr. 1505).

Jocher's attempts to effectuate changes at Sequoyah involved significant interaction with plant and non-plant personnel. Patrick Lydon (TVA's Corporate Operations Manager) testified that some workers were unhappy with the "higher standard" set by Jocher (Tr. 624). Lydon said that he found Jocher to be an "excellent manager" and a "team player" while at Sequoyah (Tr. 613-14). Lydon received no complaints about Jocher's management style and no claims that Jocher belittled or intimidated the chemistry staff (Tr. 615-16). Dr. E.S. Chandrasekaran (TVA's Senior Chemistry and Environmental Specialist) testified that Jocher was never demeaning or unprofessional with the Sequoyah staff (Tr. 778). James Mullenix, a Quality Assurance assessor for TVA, testified that Jocher behaved well in staff meetings and never embarrassed members of the staff. Mullenix said that Jocher was effective at address-

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<sup>13</sup> Keuter acknowledged that the NSRB instructions for administering the test implied that the test was not to be administered anonymously: "The Chemistry Manager agreed to administer an examination in November 1992 to establish a baseline of knowledge level. Appropriate remedial action and supervisor attention will be provided for personnel not passing the examination." (Tr. 954-55, RX 20).

<sup>14</sup> NSRB is an independent board of senior TVA managers (ALJX 39).

<sup>15</sup> TPEC is a policy making body for TVA's nuclear division. It is typically chaired by the Senior Vice-President for Nuclear Operations and includes plant managers, department vice presidents, and personnel and training managers (Tr. 1501-02).

ing problems brought to his attention by Quality Assurance, unlike previous managers who downplayed problems and were loathe to take action<sup>16</sup> (Tr. 803-05). Donald Vetal of NUS testified that his observation of Jocher revealed that he (Jocher) worked effectively with his staff (Tr. 695).

When Jocher went to Sequoyah there were several vacant positions in the site chemistry organization. Jocher told Sequoyah Human Resources Manager K. Jill Wallace that he wanted to fill those positions with two persons he previously worked with at other power plants. Wallace told Jocher that the additions could pose head count problems because the vacant positions were going to be eliminated. Wallace testified that Jocher became frustrated with the delays associated with changing personnel (Tr. 712). She felt that Jocher was moving too quick<sup>17</sup> (Tr. 710-711). Wallace also testified that she complained to management that Jocher was very arrogant, loud [and] demanding," that he tried to "talk down" to her, and that he treated her like a "little girl [who] doesn't know what she's doing." (Tr. 714-17, 1388-89). She acknowledged that after she made her concerns known to Jocher he treated her in a more polite manner (Tr. 727). As part of Jocher's personnel changes, he attempted to transfer certain instrument maintenance work from the instrument mechanics to the chemistry technicians, to get higher priority for maintenance of the instruments. Jocher did not use proper channels and upset the personnel effected by his proposal (Tr. 717-721, 728, 1263-64, 1365-68, 1389-1390).

In February of 1993, Jocher called Sam Harvey, a manager Jocher had brought onto TVA's corporate chemistry staff in 1991, from Jocher's former place of work, the South Texas Nuclear Project. Jocher was angry because he felt that Harvey had improperly disagreed with him in discussions with a Quality Assurance auditor. That evening Harvey had a meeting with Dan Keuter and told him about the incident, that he was disturbed to be attacked, and that he did not know if he could work with Jocher. Keuter considered that Harvey had been a strong supporter of Jocher and told Harvey not to worry, that his job was secure. The next day, Harvey told McArthur, who told Jocher about Harvey's fear.

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<sup>16</sup> Mullenix was involved in a confrontation with David Goetcheus, TVA's Corporate Manager of Outage Management and Steam Generator Technology. At the hearing, Goetcheus acknowledged that he became very upset with Mullenix, overreacted, cursed and behaved in an inexcusable way. Goetcheus said he soon realized his error and apologized. Mullenix filed an employee concern report over the incident (Tr. 1564-68).

<sup>17</sup> Wallace testified that Jocher told her he had authority from TVA management to make changes as he deemed necessary. Wallace checked with TVA management and was told that Jocher had no such authority (Tr. 736).

Jocher promptly called Harvey to his office and attempted to reestablish their working relationship (ALJX 39).

Dan Keuter testified concerning the feedback he received concerning Jocher's management style at Sequoyah. He said that Jocher was having trouble getting the technicians to buy into his ideas; that Jocher usually managed by memo and was not a "hands on" manager; and that Jocher frequently meddled in the affairs at Browns Ferry (Tr. 910-911). Wilson McArthur also received feedback concerning Jocher's management style. He said that Jocher needed to be more of a team player; was too slow to implement changes; and often played favoritism with the people he brought to Sequoyah (Tr. 1104, 1121, 1123). Like Keuter, McArthur commented that Jocher was too memo minded and meddled in the affairs of Browns Ferry (Tr. 1116-17). David Goetcheus, TVA's corporate Manager of Outage Management and Steam Generator Technology, questioned Jocher's management skills, testifying that he was slow to implement changes<sup>18</sup> (Tr. 1550-54).

#### E. Jocher's Protected Activity at Sequoyah

##### 1. Post-Accident Sampling System

The Post-Accident Sampling System (PASS) came about as a result of the accident at the Three Mile Island nuclear plant (Tr. 591). After the accident, it was necessary to obtain a sample of the reactor coolant system (Tr. 142). This posed a great risk of radiation exposure to the persons taking the sample (Tr. 591). Manufacturers devised a safer means of obtaining the sample by using a heavily shielded panel apparatus (Tr. 142-43). Federal regulations set forth the requirements that a licensee must meet in order to satisfy post-accident sampling conditions (Tr. 143). TVA did not have an effective PASS in place, and this was noted in a 1988 visit by INPO, which wrote that "the post-accident sampling system is not reliable due to equipment and procedure deficiencies." (CX 168). McArthur acknowledged that while TVA knew of the

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<sup>18</sup> As an example of Jocher's inappropriate conduct in meetings, TVA pointed to an incident occurring during a high level meeting at Sequoyah in 1992. Jocher was one of several people chosen to give a formal presentation to representatives of TVA management and the Nuclear Regulatory Commission. Joe Bynum, TVA's Vice President of Nuclear Operations, was at the meeting and testified that Jocher went beyond his "scripted" material and began "ad libbing," claiming that with all the good things he was doing at Sequoyah, "he was not being paid enough money." (Tr. 1395-96). Bynum said that Jocher's comments were inappropriate and made everyone in the meeting uncomfortable (Tr. 1396). Bynum testified that while the remark did not directly cause him to seek Jocher's resignation, it was a "dumb thing to say" and confirmed his assessment of Jocher (Tr. 1468-69).

PASS problem, formal corrective action was never initiated (Tr. 1216-17).

Every chemistry lab technician was tested to see if he or she could operate the PASS equipment to obtain a gas and liquid sample and to complete an analysis within three hours. The site training organization administered the test. The test revealed that there were an insufficient number of personnel who could obtain samples and complete an analysis within three hours. Jocher initiated a Significant Corrective Action Report (SCAR) 92-0004 on May 11, 1992<sup>19</sup> (ALJX 39, CX 75). A SCAR is a formal corrective action document at TVA, and a copy is automatically provided to the on-site Nuclear Regulatory Commission (NRC) representative (ALJX 39). A SCAR is the most serious level of corrective action and garners the most attention from TVA management and the NRC (Tr. 592, 1435). Jocher testified that as a result of the SCAR the PASS equipment was corrected and all of the technicians were trained (Tr. 208-211).

Jocher and Sequoyah Vice President Jack Wilson disagreed over the interpretation of Federal regulations pertaining to the PASS (Tr. 201-02, ALJX 39). The disagreement centered around the allowable time frame to obtain a sample (Tr. 201-02). Jocher believed that once the decision had been made to obtain a sample, the clock began to run - even before assembling the sampling team (Tr. 202). Wilson maintained that the clock did not begin to run until the decision was made to take the sample and the sampling team had been assembled (Tr. 1061). To resolve the conflict, Jocher, with McArthur's approval, called a representative of NRC's Nuclear Reactor Regulations office (NRR) (ALJX 39).<sup>20</sup> McArthur subsequently told Jocher that Robert Beecken (Sequoyah's plant manager) and Wilson were unhappy that he (Jocher) had contacted NRR (Tr. 206, 593). Beecken denied being unhappy with Jocher's decision, testifying that he "more so . . . endorsed him" (Tr. 1268).

## 2. On-Line Instrumentation Monitors and Calibration

Jocher also reported problems concerning the on-line instrumentation system. When working correctly, this system gives a

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<sup>19</sup> While at Sequoyah, Jocher also was the manager responsible for initiating the development of two Problem Evaluation Reports (PERs) related to the overflow of some reactor coolant from two tanks used in PASS testing. PERs are also formal corrective action documents.

<sup>20</sup> Charles Kent, TVA's radiological control manager, disagreed with Jocher's interpretation, testifying that TVA views the regulation differently (Tr. 1282, CX 75).

constant reading of the erosion and corrosion processes occurring within the pipes of the plant (Tr. 120). When the instruments are not working, readings can be taken by obtaining a "grab sample," which means that a technician will go out and physically obtain a sample from within the pipe and bring it back to the laboratory for analysis (Tr. 118). The grab sample technique can be unreliable because (1) it only allows for a look into what the situation is at the exact moment when the sample is taken, creating the possibility of missing an event occurring between two samples and (2) it is susceptible to human error, i.e., decay occurring in the time it takes to take the sample and run it back to the laboratory (Tr. 117-18, 120). For these reasons, an on-line instrumentation system is always preferable (Tr. 119). Jocher testified that he estimated that 40 percent of the daily samples were grab samples due to the fact that instruments were not operable (Tr. 119). The high rate of operable monitors stemmed from the fact that there was a backlog of work requests for the maintenance department (Tr. 123-25, 820, 1365). The percentage of instruments out each month were reported in the Sequoyah monthly chemistry reports (CX 55A-J).<sup>21</sup>

As with PASS, the lack of operable monitors problem had been identified previously by both ORR and INPO. In a review ORR conducted in 1987, it was noted that "large numbers of work requests, engineering change notices and conditions adverse to quality remain open for extended periods of time." (CX 163). INPO's review found that approximately 35% of the on-line monitors were out of service that approximately 86% of these out of service monitors (30% of the total monitors) had been inoperable for over three months, with some dating back to 1990 (CX 65). INPO also noted that "some of the monitors that have been out of service for an extended period of time are significant in controlling plant chemistry." Id.

On June 23, 1992, Jocher entered the on-line instrumentation problems into the formal corrective action process by initiating a SCAR (CX 69). The SCAR raised the following issues: (1) approximately 40% of the on-line analyzers used by Chemistry to monitor plant operations systems were out of service at any given time; (2) the alarm setpoints on the on-line analyzers had been improperly set; and (3) that the required annual calibration of those

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<sup>21</sup> Concerning work request backlogs, Dan Keuter (TVA's Vice President of Operation Services) testified that if an area in need of repair poses a low safety concern and has a high repair cost, it receives low priority (Tr. 948).

instruments was last performed on May 10, 1985 and February 21, 1984, for units 1 and 2, respectively<sup>22</sup> (ALJX 39).

Pat Lydon testified that when Rob Beecken (Sequoyah's Plant Manager) learned of Jocher's corrective actions he became visibly upset (Tr. 587-88). Lydon said that Beecken was upset because he felt the on-line monitoring issue was non-safety related and did not merit SCAR status (Tr. 588). Wilson McArthur (TVA's Manager of Technical Support) testified that he did not disagree with Jocher's decision, that it was part of Jocher's responsibility and had no adverse effect on him (Tr. 1150-51).

Jocher's SCAR came to the attention of the resident NRC inspector (Tr. 228). In a March 22, 1993 formal Notice of Violation (NOV) from the NRC that addressed other problems, the NRC indicated it was concerned about the on-line instrumentation issues raised by Jocher in his SCAR and that the NRC was going to conduct an investigation in its next visit (CX 96). When the NRC did the investigation, it concluded that 50 of the non-operative instruments encompassed by Jocher's SCAR were safety related and the NRC issued a NOV on April 22, 1994 (Tr. 229, CX 97).

### 3. Chemical Traffic Control

Unlabeled containers pose a problem for nuclear power plants because their contents (i.e., chemicals) may have a corrosive effect if it interacts with metal, heat or other chemicals inside the plant (Tr. 602). Consequently, all containers inside a power plant must be properly labeled. This process is known as chemical traffic control. A 1992 assessment of Sequoyah's chemistry program identified a problem with the Plant's chemical traffic control procedures; this finding resulted in a NRC Notice of Violation against TVA (ALJX 39).

In response to the Notice of Violation, TVA assured NRC that the problem would be rectified (CX 81). The nuclear consulting firm NUS conducted a chemical traffic control audit of Sequoyah and developed a list of approved and unapproved chemicals (Tr. 690). Subsequently, TVA's training department put together a 30 minute

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<sup>22</sup> In November of 1992, Jocher was the manager responsible for the initiation of documentation leading to TVA filing a Licensee Event Report (LER) with the NRC concerning improper calibration of both safety and non-safety related radiation monitors (CX 89). An LER is a nuclear regulatory document and is generated as a result of a violation of the plant's technical specifications (Tr. 212). In accordance with its practice, TVA sent the LER to the INPO records center for circulation throughout the industry, to the NRC in Washington, D.C., the regional office in Atlanta, Georgia, and to the local NRC resident official at Sequoyah (ALJX 39).



video explaining the proper chemical traffic control procedures (Tr. 604-05). TVA assured the NRC that designated departments would view the training film (CX 81). Patrick Lydon (TVA's Corporate Operations Manager) testified that TVA's goal was to have all on-site personnel view the film by a certain date (Tr. 604-05). On November 3, 1992, TVA sent the NRC a letter stating that they were in full compliance, meaning that all designated personnel had viewed the chemical traffic control training film (CX 82).

Jocher testified that a few weeks later he received a computerized printout showing that not everyone had viewed the training film<sup>23</sup> (Tr. 262). James Mullenix (Quality Assurance for TVA) testified that he too discovered that not all of the designated personnel had viewed the film, while TVA management represented to the NRC that they had (Tr. 810, CX 174). Charles Kent (TVA's Radiological Control Manager) disputed the accuracy of the printout, testifying that he viewed the film but was not given credit for it (Tr. 1318-19). In a NSRB meeting in February of 1993, Jocher stated that about 20% of the persons at the site had not attended the chemical traffic control training film (ALJX 39).

TVA disputed Jocher's allegations, pointing out that no Notice of Violation resulted from Jocher's February 1993 statement (RX 50). TVA's response to the NRC's Notice of Violation included an assurance to train craft employees<sup>24</sup>, not all Sequoyah employees, as Jocher had alleged (Tr. 1674-79, RX 57). Charles Kent (Sequoyah's Radiological Control Manager) testified that the NRC representatives told him that Sequoyah's problem was with the labeling of containers, not with chemical traffic control training. He said that the NRC was "fully satisfied that [TVA] had met [its] training commitment (Tr. 1291-93, RX 50). The NRC was in contact with Jocher after he left TVA, and after another investigation, it concurred with Jocher's assessment that the chemical traffic control training had not been completed in a timely manner (CX 98).

Jocher was not alone in initiating corrective action reports. Even before he arrived at Sequoyah, forty other LER's and 478 other corrective action documents such as SCARS and PERS had been filed by other TVA managers and employers (Tr. 1296-99, RX 23). Dr. Don Adams (Sequoyah's Chemistry Program Manager) testified that "a number of corrective actions [had been] filed and reported on the

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<sup>23</sup> The large number of workers and conflicting work schedules made it difficult for everyone to view the video. To monitor the progress, TVA initiated a "tracking and reporting of open items" (TROI), a computerized database that loads all internal and external commitments (Tr. 259, 606, CX 84). It was from this database that Jocher received the computerized printout.

<sup>24</sup> Craft employees are non-management level employees.

[Sequoyah chemistry] program to document weaknesses." (Tr. 1047). Joseph Bynum, TVA's Vice President of Nuclear Operations, testified that he was concerned with TVA's inability to reduce the number of corrective action documents (Tr. 1435-36).

Jocher testified that most SCARS are initiated because of isolated incidents, but that the ones he initiated dealt with programmatic breakdowns (Tr. 215-16). Patrick Lydon (TVA's Corporate Operations Manager) also testified that Jocher's corrective actions were programmatic in nature. A programmatic breakdown represents a system wide problem and generates a higher level of concern (Tr. 216-17, 667-69, 1437). Charles Kent testified that while TVA is accustomed to the filing of corrective action reports, some upset management more than others (Tr. 1311). Jocher acknowledged that raising safety concerns was part of his job and that he was not criticized for doing so (Tr. 361-62). Joseph Bynum (TVA's Vice President of Nuclear Operations) testified that he did not scrutinize corrective action reports and was unaware of the ones initiated by Jocher (Tr. 1410-1411, 1463-64). Kent believed that Jocher's initiation of the corrective action reports was designed to draw attention to the problems at Sequoyah's chemistry program so that TVA management would devote more financial resources to the program, thereby allowing Jocher to meet his goals (Tr. 1308-09, CX 125).

F. Documentation of Jocher's Performance While at Sequoyah

Jocher testified that while he was at Sequoyah he never received any verbal or written counseling or reprimands (Tr. 294, 302). Wilson McArthur testified that Joseph Bynum, Dan Keuter and himself had on occasion talked about Jocher's management problems (Tr. 1135). McArthur had also spoken to Jocher about his behavior. McArthur's work notes show that he spoke to Jocher on February 19, 1992, reminding him "to be less aggressive and to work with others" and that he "may not always be in fact right." (Tr. 1104, 1238, RX 12). On February 25, 1993, before Jocher returned to his corporate position, McArthur and Jocher discussed his need for rapport with the sites (Tr. 1129, RX 12, ALJX 39). On March 10, 1993, McArthur and Jocher agreed that Jocher would work on his management skills. McArthur recorded in his work notes that Jocher was committed to developing a better attitude (Tr. 1239-1240, RX 12, ALJX 39). At the hearing, Jocher acknowledged that McArthur discussed with him the need to "tone it down a little bit." (Tr. 1662). Jocher's work notes dated March 10, 1993, express concern that TVA might "ax" him (Tr. 295-96, CX 15). When questioned on how much he knew of McArthur's counselling of Jocher, Joseph Bynum replied that he took McArthur's word that he (McArthur) had counseled Jocher (Tr. 1419, 1462). Michael Pope, a member of TVA's Human Resources Department who was involved in Jocher's departure, testified that McArthur told him that he (McArthur) counselled Jocher during the previous year; however, Pope said that he was not aware of the existence of warning letters (Tr. 1346).

Jocher's second performance evaluation covered the period from October 1, 1991 to September 20, 1992, which included six of the twelve months he worked at Sequoyah (CX 14). As with his first performance review, Jocher's second review, which was signed by Patrick Lydon and Robert Beecken, was overall favorable. The review stated that Jocher

[H]as made significant progress on the Chemistry Improvement plan. He promptly identifies problems and aggressively works to correct them. . . . [Jocher] approaches all work as a member of [Sequoyah's] plant team while still providing input to the corporate Chemistry group. He has established high standards for himself and the Chemistry department and holds all accountable.

Id.

The review further read: "[Jocher] is very proactive and has established a run-it-like-it-was-our-own business attitude which had been missing in the Chemistry department." Id. The report listed a litany of Jocher's accomplishments during the six months he was stationed at Sequoyah, many of which have been discussed previously (improvement of chemistry instrumentation, defined job assignments, implementation of PASS procedures, implementation of raw cooling water and equipment control plan). Id. The review concluded that Jocher had made significant improvement in Sequoyah's chemistry department. Id.

As part of the performance review, McArthur submitted a letter listing Jocher's strengths and weaknesses. He noted Jocher's technical strength and high motivation as strengths. He also noted that Jocher's "support with others sometimes require[s] some work" and that Jocher did not "desire to work with those he assumes to be unqualified." McArthur concluded that Jocher was "in the category of someone that" he "would want on his team, either at Corporate or at the site." (CX 14, ALJX 39). McArthur acknowledged that his comments did not include observations of management problems, and that if he felt Jocher had problems in that area, he would have initiated progressive discipline procedures (Tr. 1224, CX 129A).

In February 1993, external review of the Sequoyah chemistry program by TVA's NSRB noted in connection with the Chemistry Improvement Program that "significant progress has been made in Site Chemistry." The NSRB also noted that there were still problems with basic housekeeping, data recording and labeling of some materials in the chemistry laboratory. These had been problems at Sequoyah prior to Jocher's arrival (ALJX 39). As Jocher's one-year temporary assignment to Sequoyah drew to a close, Robert Beecken (Sequoyah's Plant Manager) decided that he did not want to retain Jocher at the Plant beyond the agreed-upon year (Tr. 1256, 1264-66). In Beecken's view, Jocher had failed to take effective action to resolve the problems that had been identified in the Sequoyah chemistry program (Tr. 1264-66). Jocher returned

to TVA corporate on or about March 8, 1993, after completing his one year tenure at Sequoyah.

G. The Circumstances Surrounding Jocher's Departure from TVA

Discussions of the events surrounding Jocher's departure from TVA are contained in transcripts of interviews from TVA's Office of Inspector General (TVA OIG)<sup>25</sup> and from testimony at the hearing.

The TVA OIG interviews revealed conflicting accounts of the events surrounding Jocher's departure. In early March of 1993, Bynum, Keuter and McArthur had a meeting to discuss Jocher's return to TVA corporate. Bynum expressed concern that Jocher was not fitting in and would have a hard time convincing the sites to "buy in" to his ideas once he returned to TVA corporate. Keuter proposed a six month improvement period to allow Jocher to prove his management skills. McArthur agreed with Keuter's suggestion. Both Keuter and McArthur, in separate interviews with the OIG, said that Bynum agreed to Keuter's proposal (CX 126B, 129B). When the OIG asked him about the six month improvement plan Bynum said that he did not recall specifically discussing such a plan but said that they may have discussed a "get well" program; he said that the first time he heard of a six month improvement plan was after the fact (CX 113B).

McArthur said that after the early March 1993 meeting, on or about March 10, 1993, he approached Jocher and told him that he had six months to improve his performance (CX 129B). Jocher testified that Benjamin Easley of TVA's Human Resources Department also told him about the six month improvement plan (Tr. 298). Easley testified that he did, in fact, inform Jocher of the six month improvement plan (Tr. 1596).

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<sup>25</sup> TVA's OIG is charged with reporting to the TVA Board of Directors and the United States Congress on the overall efficiency, effectiveness, and economy of all TVA programs and operations; on TVA efforts to prevent and detect waste, fraud, abuse; and on investigations of employee concerns. OIG is responsible for identifying and investigating indications of allegations of irregularities, waste, fraud, abuse deviations from TVA's standards of employee conduct or violations of applicable law. TVA's Inspector General is independent and subject only to the general supervision of the TVA Board of Directors.

It is policy of TVA's Nuclear Power organization to request OIG to investigate the circumstances surrounding each complaint filed under the Act in order to obtain an independent view of the facts so that TVA management can assess whether corrective action needs to be taken with respect to TVA policies. OIG conducted such an investigation in the present case.

Bynum, Keuter and McArthur held a second meeting in early April of 1993. Keuter and McArthur told the OIG that at that meeting Bynum said that Jocher was not working out and that he should be asked to leave (CX 126B, 129B). Keuter and McArthur said that they were surprised by Bynum's decision to abandon the six month improvement plan and did not know why he chose to do so. Id. Both Keuter and McArthur told the OIG that, if the decision was up to them, they would have retained Jocher. Id.<sup>26</sup>

Bynum's interview with the OIG produced a different version of events. He attributed Jocher's departure to downsizing,<sup>27</sup> saying that Keuter and McArthur wanted to hire Gordon Rich as Sequoyah's chemistry manager and when TVA management decided not to fill the position the two lobbied for Rich's hiring at TVA corporate, meaning that Jocher would have to be let go to create a position for Rich (CX 113B). Bynum said that the downsizing, coupled with Keuter's and McArthur's desire to hire Rich, was the deciding factor in asking Jocher to leave; he said that the decision was a consensus. Id.

Keuter and McArthur disagreed with Bynum's account. Keuter told the OIG that the downsizing had already occurred and that Rich's candidacy for a position with TVA was only in the preliminary stages (CX 126B). He said that it was not until after Jocher left and the site chemistry manager position became unavailable that Rich was considered for the corporate position. Id. McArthur did not recall discussing TVA downsizing with Bynum (CX 129B). Both said that the decision to let Jocher go was not a consensus<sup>28</sup> (CX 126B, 129B).

Bynum's, Keuter's and McArthur's hearing testimony concerning Jocher's departure was more compatible, although some testimony contradicted earlier statements made to the OIG. Bynum downplayed his earlier statements concerning TVA downsizing, testifying that Jocher's departure was based solely on his poor managerial performance (Tr. 1405-06). McArthur retreated from his earlier statement about not wanting to let Jocher go, saying that TVA was justified in asking him to leave (Tr. 1147). Contrary to what he told the OIG, Keuter testified that the decision to ask Jocher to

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<sup>26</sup> Both said the decision to let Jocher go was at the behest of Bynum (CX 126B, 129B).

<sup>27</sup> Bynum told the OIG that the downsizing involved reducing the staff at TVA corporate chemistry from eight people to four people (CX 113B).

<sup>28</sup> Keuter testified that Bynum became upset that when he learned of the conflicting stories. When Keuter approached him to talk about it, Bynum told him that "somebody's lying, and it's not me. Get your ass out of here." (Tr. 983).

leave was a consensus (Tr. 967). In an effort to explain the six month improvement plan discrepancy with Bynum, Keuter testified that he recalled Bynum telling him to "make sure that Bill Jocher is looking for a job," hypothesizing that Bynum may have meant that Jocher had six months to find a new job (Tr. 920-21).<sup>29</sup> Both Keuter and McArthur testified that they were still in favor of the six month improvement plan (Tr. 967, 1138).

Further testimony was taken concerning the six month improvement plan discrepancy. At the second meeting Bynum expressed concern over Jocher's ability to perform and inquired if he should be asked to leave. Keuter responded that he thought they had agreed to a six month improvement plant, to which Bynum responded "[d]o you really think that [Jocher] is going to change?" Keuter said that he did not think so. McArthur testified that Bynum then said: "why don't we just get the job done and go ahead and ask [Jocher] to resign." (Tr. 923, 966-67, 977, 982, 1402, 1168, 1237-1240). McArthur did not believe asking Jocher to resign would be a problem. He testified that even before Bynum, Keuter and he met, Jocher told him: "hey, if I don't fit in here, if I'm not accepted by management, you know me, I can find a job any place. I'll leave, I'll resign (Tr. 1142). In early April 1993, before he was asked to leave, Jocher repeated his offer to resign. Jocher acknowledged that he had offered to leave but testified that he did not anticipate McArthur's response, which was that "it may come to that." (Tr. 454).

Jocher testified that on April 5, 1993 McArthur met with him and told him that he (Jocher) was not a team player and that he should begin looking for another job (Tr. 302). Jocher then went to Keuter's office to inquire about the problem but was told that it was too late, that TVA was preparing two letters for him - one for resignation and one for termination. Id. Jocher said that he asked Keuter about a transfer from nuclear to fossil and was told it was not an option. Id. Later in the same day, McArthur called Jocher into his office, where they were joined by Benjamin Easley (TVA Office of Human Resources). McArthur showed Jocher the two letters.<sup>30</sup> Jocher testified that upon reading the letter of

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<sup>29</sup> At the hearing Keuter said that he had met with TVA counsel to "iron out" the previous misunderstandings (Tr. 1019).

<sup>30</sup> The resignation letter read:

This is to inform you that I am voluntarily resigning my position as Manager, Chemistry effective \_\_\_\_\_.  
(CX 19).

The termination letter read:

(continued...)

termination he asked to see documentation supporting its allegations of poor management performance; Jocher said that McArthur was unable to do so. Id. Easley testified that he did not recall Jocher asking for documentation<sup>31</sup> (Tr. 1594). Jocher testified that when he asked what would happen if he did not sign the letter of resignation he was told that he would be terminated (Tr. 303). Jocher signed the letter of resignation, filling in a six month resignation date (October 5, 1993) (Tr. 308, CX 20). McArthur testified that after Jocher filled in the October 5, 1993 date, he told him that he (McArthur) was not authorized to give Jocher six months but that he would go back and discuss it with management (Tr. 1143).

Jocher testified that when he arrived at work the next day he was told that the six month resignation date was unacceptable, that the most TVA was willing to offer was three months (Tr. 309). Jocher signed the letter of resignation with a three month resignation date typed in, acknowledging that he signed the letter to barter for some time, some security and some income (Tr. 309, 460, CX 22).

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<sup>30</sup>(...continued)

This is to inform you that you will be terminated from your position as Manager, Chemistry, Technical Programs, Operations Services, Chattanooga, Tennessee, effective May 5, 1993. this action is being taken because your overall performance in that position has not been adequate, particularly in the area of your management skills. These performance issues have been discussed with you on several occasions, but there has not been sufficient improvement. It is essential that this position be filled with an individual that can be recognized as a primary support to the nuclear sites and has the management capabilities to do so. We have lost confidence in your ability to carry out these responsibilities. It is, therefore, necessary that your employment be terminated.

If you have any questions or wish to discuss this matter, I will be available to do so.  
(CX 17).

Easley prepared both letters (Tr. 1592).

<sup>31</sup> Bynum and Keuter testified that traditionally managers at Jocher's level are not given warning letters or progressive discipline as would be provided to lower level, bargaining unit employees (Tr. 932-33, 1409-1410). Bynum testified that it was very common for TVA managers to be removed from their positions (Tr. 1408-09). Some are retained by TVA in other positions (Tr. 973-74).

Jocher said that when he met with McArthur to sign the letter of resignation he asked him if he would write a letter of recommendation for him; McArthur agreed to write the letter<sup>32</sup> (Tr. 310). Jocher testified that his request for the letter of recommendation was not part of a negotiated resignation, that McArthur simply agreed to write the letter<sup>33</sup> (Tr. 309-310). McArthur disagreed,

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<sup>32</sup> The letter of recommendation read:

I have worked with Bill for approximately three (3) years. During this period of time he has reported to me directly as the Manager of Corporate Chemistry. One year of this time was spent at the Sequoyah Nuclear Plant (SQN) as the SQN Supervisor of Chemistry and Environmental. Bill's assignment at SQN was necessitated due to chemistry problems at the plant and management determination that he could be effective in correcting those problems.

During Bill's tenure with the Tennessee Valley Authority (TVA) he has been a very responsible Chemistry Manager in both the technical and oversight areas. He was effective in identifying problems and developing a corrective action plan, not only for SQN and Browns Ferry Nuclear plants, but Watts Bar Nuclear Plant as well.

I found him to be trustworthy, dependable and professional in his responsibilities. I would personally hire him as a Chemistry Manager again if the situation occurred.

Bill's capabilities will most assuredly be missed at TVA.

<sup>33</sup> At the hearing the following deposition testimony from Jocher was read into the record:

Question: What were the circumstances under which Dr. McArthur was giving you this letter of recommendation?

Answer (Jocher): The circumstances were I requested a letter of recommendation from him to help me facilitate finding employment somewhere else.

Question: Was this part of the agreement on your resignation, that he would provide you a letter of reference?

Answer (Jocher): I asked him to provide me a letter of reference. I wouldn't characterize it as an agreement, I mean, if I sign this, will you give me that, in that context.

Question: Well, what was the context, I guess?

(continued...)



testifying: "This was a negotiated resignation, a letter of recommendation based on his resignation. What I wanted to do was to provide him support in finding a job some place else." (Tr. 1164).

Within two weeks of his signing the resignation letter, Jocher told at least eight persons, both inside and outside of TVA, that he had been let go by TVA and had resigned under threat of termination (ALJX 39). On June 10, 1993, with the assistance of counsel, Jocher sent a letter to TVA seeking to withdraw his resignation. Id. TVA had already hired Gordon Rich, his replacement. Jocher received full pay and benefits until July 6, 1993. His job search has resulted in his starting another job on March 15, 1995, with a different mix of annual compensation and benefits, which could be greater or lesser than his TVA compensation, depending on performance. Id.

#### IV. FINDINGS OF FACT

Based on my review of the testimony and exhibits, summarized above, I make the following factual and credibility findings:

1. Respondent TVA is an agency and instrumentality of the United States Government. It holds several nuclear plant licenses from the United States Nuclear Regulatory Commission.

2. Between November 26, 1990, and July 6, 1993, Complainant, William F. Jocher was employed by TVA as a PG-10 nuclear manager (grade PG-10 on TVA's Management and Specialist Pay Schedule), in its corporate nuclear offices in Chattanooga, Tennessee, and at its Sequoyah Nuclear Plant, located near Soddy Daisy, Tennessee. Grade PG-11 is the highest grade on TVA's Management and Specialist pay schedule.

3. Jocher has considerable experience in the nuclear chemistry field and his technical skills are very sound. His managerial skills were lacking.

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<sup>33</sup>(...continued)

Answer (Jocher): I asked for a letter of recommendation.

Question: All right, sir. But was it part of the discussion of the terms for your resignation?

Answer (Jocher): Oh, yes. Absolutely. I wanted something to counteract any retaliatory measures that TVA might take in seeking employment elsewhere. You know, at least I would have something in my hand to say, well, this is the man I worked for, contact him.

(Tr. 459).

4. Jocher was effective in his work at TVA corporate. His efforts to promote the adoption of the hydrogen water chemistry plan proved successful and many of his ideas were well received by TVA management.

5. TVA management assigned Jocher to Sequoyah because he was the most qualified person for the job, not because they decided to give him a second chance to prove himself. Jocher had spent considerable time at TVA corporate investigating the problems at Sequoyah, documenting his findings in the "Chemistry Improvement Manual." TVA management impressed upon Jocher the need to revamp Sequoyah's chemistry program. Jocher arrived at Sequoyah knowing that he had only one year to improve the program and made laudable efforts to do so, as evidenced by the various programs he initiated.

6. Jocher was not the most popular person at TVA, nor was he the most disliked. He has an aggressive personality which at times made him difficult to work with. The worst relationship that Jocher had at TVA was with John Sabados, evidenced by the numerous confrontations that the two had. Jocher was sincere in his efforts to get along with Sabados after being told that he had to be more cooperative. The other "run ins" that Jocher had with TVA personnel, including those with Betsy Eiford Lee, K. Jill Wallace, Don Adams, David Sorrelle and Sam Harvey are best described as petty and are not unusual for a high pressured work setting such as TVA.

7. Jocher's comments during the TVA/NRC meeting were inappropriate. The meeting was an isolated incident, however, and did not pertain to his management style. TVA's decision to ask Jocher to leave was not rooted in this incident.

8. Jocher's testing of the technicians revealed a low level of theoretical knowledge in chemistry related matters. The fact that Jocher required the technicians to include their names on the test upset the them and caused morale problems. The language in the NSRB directive for administering the test implied that the test was not to be given anonymously. The results of TPEC's retest were similar to the results of the Jocher-administered test.

9. Jocher was shown to lack credibility in two areas - his educational background and the diesel oil spill incident at Sequoyah. Jocher misrepresented his educational background in both his TVA application for employment and post-TVA applications. Jocher's denial that he issued cleanup instructions for the spill was contradicted by a September 21, 1992 memorandum signed by him, which contained his proposal for cleanup of the spill.

10. Jocher was involved in four incidents of protected activity - the PASS SCAR, two PERS related to the overflow of reactor coolant, the on-line instrumentation SCAR, and his comments

during the NSRB meeting concerning Sequoyah's chemical traffic control training. The problems reported by Jocher were programmatic in nature, more serious than isolated incidents. TVA management did nothing to discourage Jocher's actions; corrective action reports are common at TVA and accepted by TVA management. The on-line instrumentation SCAR resulted in an April 22, 1994 Notice of Violation.

11. McArthur spoke to Jocher four times about his poor behavior - during the Sabados meeting; on February 19, 1992 (for his behavior at corporate); on February 25, 1993 (for the incident with Sam Harvey); and on March 10, 1993 (told of the six month improvement plan). McArthur recorded each of these meetings in his work notes.

12. Combined, Jocher's two performance reviews covered the period when he was at TVA corporate and six of the twelve months he was at Sequoyah. The reviews were favorable and for the most part did not support TVA's claims of poor management performance.

13. Jocher had on two occasions told McArthur that he was willing to resign if things were not working out. Jocher did not expect his comments to be taken seriously. Bynum, Keuter and McArthur met two times concerning Jocher's status at TVA. During the first meeting, all three agreed that Jocher would be given six months to improve his performance. Bynum alone abandoned the six month plan in the second meeting and ordered Jocher terminated. Keuter's and McArthur's answers to the TVA OIG questions concerning the events surrounding Jocher's departure were consistent and credible. Bynum's abandoning of the improvement plan (in early April of 1993) after being told by the NRC on March 22, 1993 that they were going to investigate Jocher's on-line instrumentation SCAR is suspect as I find the timing too coincidental.

14. Jocher did not negotiate his resignation. Either he signed the resignation letter or he was going to be fired. TVA's granting of a three month resignation date and McArthur's letter of recommendation served as accommodations to Jocher. McArthur's comments in the letter, that he would personally hire Jocher if the situation arose, were not meant to be taken literally as they were made only in the context of a letter of recommendation.

## V. ANALYSIS

The Energy Reorganization Act prohibits employers subject to its provisions from discriminating "in practically any job-related fashion against an employee because the employee participated in NRC investigatory or enforcement proceedings." DeFord v. Secretary of Labor, 700 F.2d 281, 286 (6th Cir. 1981). The statute has necessarily been interpreted broadly "to prevent employers from inhibiting disclosure of particular facts or types of information." Id. "The statute is aimed at preventing intimidation and whether

the scope of such activity happens to be narrow or broad in a particular case is of no import." Id. The Act specifically provides protection to an employee who:

(A) notified his employer of an alleged violation of this chapter . . . ;

(B) refused to engage in any practice made unlawful by this chapter . . . if the employee has identified the alleged illegality of the employer;

(C) testified before Congress or at any Federal or State proceeding regarding any provision (or proposed provision) of this chapter . . . ;

(D) commenced, caused to be commenced, or is about to commence or cause to be commenced, a proceeding under this chapter . . . or a proceeding for the administration or enforcement of any requirement imposed under this chapter;

(E) testified or is about to testify in any such proceeding; or

(F) assisted or participated or is about to assist or participate in any manner in such a proceeding or in any other action to carry out the purpose of this chapter . . .

42 U.S.C. §5851(a)(1)(A)-(F).

Claims brought under the Act are subject to the following burdens of proof and production: (1) the complainant must first lay out a prima facie case of discrimination. DeFord, 700 F.2d at 286; (2) if the complainant satisfies the elements for a prima facie case, then the evidentiary burden shifts to the respondent to prove that the alleged discriminatory activity was in fact legitimate, non-discriminatory. Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 254-55 (1981); (3) if the respondent meets that burden, then the complainant must demonstrate, by a preponderance of the evidence, that the articulated reason for the adverse employment action was a pretext for discrimination. Burdine, 450 U.S. at 256; Zinn v. University of Missouri, 93-ERA-34 and 36 (Sec'y January 18, 1996); and (4) if the trier of fact determines that the respondent was motivated by both prohibited and legitimate reasons, a "dual motive" analysis is necessary. Mt. Healthy Sch. Dist. v. Doyle, 429 U.S. 274 (1977); Dysert v. Florida Power Corp., 93-ERA-21 (Sec'y August 7, 1995); Dartey v. Zack Co. of Chicago, 82-ERA-2 (Sec'y April 25, 1983).

#### A. Prima Facie Case of Discrimination

The basic elements of a prima facie case of illegal discrimination under the Act involves a showing through direct or circumstantial evidence that: (1) the respondent is governed by the

Act; (2) the complainant engaged in protected activity; (3) the complainant was subjected to adverse employment action by the respondent; and (4) a nexus exists between the protected activity and the discharge. DeFord, 700 F.2d at 286; see also Kahn v. Secretary of Labor, 64 F.3d 271, 277 (7th Cir. 1995); Bechtel Constr. Co. v. Secretary of Labor, 50 F.3d 926, 933-34 (11th Cir. 1995); Simon v. Simmons Foods, Inc., 49 F.3d 386, 389 (8th Cir. 1995). A complainant's burden at the prima facie stage is not onerous; rather, a prima facie showing is "quite easy to meet." Kahn, 64 F.3d at 277, quoting Burdine, 450 U.S. at 253. TVA holds several nuclear plant licenses from the United States Nuclear Regulatory Commission and is, therefore, governed by the Act. 42 U.S.C. §5851(a)(2)(A); see also Order Denying Motion For Summary Decision at 5-9. In their post-hearing brief, TVA conceded that the Complainant engaged in activity protected by the Act. Respondent's Post-Hearing Brief at 22.

Complainant must next demonstrate that he was subjected to adverse employment action by the respondent. As noted in the Findings of Fact, my review of the record showed that if the Complainant did not sign the letter of recommendation, he was going to be fired. Where an employee is offered the choice between resignation and termination, a resulting resignation will not be considered voluntary where the threatened termination is shown to be based on illegal or improper motivations. Schultz v. United States Navy, 810 F.2d 1133, 1136 (Fed. Cir 1987); Christie v. United States, 518 F.2d 584, 588 (Ct. Cl. 1975).

In their post-hearing brief, TVA argues that the Complainant resigned voluntarily, thereby preventing him from demonstrating an adverse employment action. TVA contends that the Complainant: (1) "repeatedly broached the topic of his resignation, and management relied on his earlier resignation offers in deciding on a course of action" and (2) negotiated both his letter of recommendation and the three month resignation period. (Respondent's Post-Hearing Brief at 29-32) These arguments, however, are without merit. Rather than "repeatedly broach[ing] the topic of his resignation," Jocher had on only two previous occasions alluded to his willingness to resign if he did not fit in. As noted in the Findings of Fact, Jocher did not expect his comments to be taken seriously; he was not prepared to resign when he made those statements. Nor am I willing to accept TVA's contention that management relied on Jocher's earlier resignation offers in deciding on a course of action. The only manager consistently testifying to this proposition was William McArthur, with Dan Keuter and Joseph Bynum offering inconsistent versions, especially in their interviews with TVA OIG. Finally, as stated in the Findings of Fact, both McArthur's letter of recommendation and TVA's offering of a three month resignation period were mere accommodations to Jocher, not negotiated conditions to his resignation. Therefore, I find that the Complainant has demonstrated that the respondent subjected him to adverse employment action.

The final requirement for a prima facie case is a showing of a nexus between the protected activity and the discharge. Proximity in time between the protected activity and the adverse employment action is sufficient nexus to satisfy this requirement. Bechtel, 50 F.3d at 934; see also Bartlik v. United States Department of Labor, 73 F.3d 100 (6th Cir. 1996)(Ryan, concurring). Interpretations of this standard vary to the point where "proximity in time" is non-definable, leaving the trier of fact to make a determination on a case-by-case basis. See Nolan v. AC Express, 92-STA-37 (Sec'y January 17, 1995)(two months between protected activity and adverse employment action sufficient to establish nexus); Zinn v. University of Missouri, 93-ERA-34 and 36 (Sec'y January 18, 1996)(six months sufficient to establish nexus); Thomas v. Arizona Public Serv. Co., 89-ERA-19 (Sec'y September 17, 1993)(twelve months sufficient to establish nexus); but see Cooper v. City of Olmstead, 795 F.2d 1265, 1272-73 (6th Cir. 1986), aff'd 848 F.2d 189 (6th Cir. 1988)(four months between protected activity and personnel action too long to establish nexus); Hughes v. Derwinski, 967 F.2d 1168, 1174 (7th Cir. 1992)(four months too long); Dillard v. TVA, 90-ERA-31 (Sec'y July 21, 1994)(one-and-one-half years too long). In the present case, the date of the adverse employment action, April 5, 1993, falls on the heels of Joseph Bynum's receipt on March 23, 1993 of NRC's letter informing him that the Commission was preparing to investigate the Complainant's on-line instrumentation SCAR. The timing of NRC's notification in relation to the Complainant's forced resignation is close enough in time to raise an inference of causation.

TVA's claim that two years passed between the Complainant's protected activity and his departure from TVA is simply wrong. TVA points out that the Complainant engaged in protected activity as early as November 1990, upon being hired by TVA, and this forms the basis for their two year interval assertion. However, the only documented incidents of protected activity occurred after the Complainant began working at Sequoyah - a period which covers approximately one year before he was forced to resign. Even if I were to credit TVA's assertion that the complainant engaged in protected activity as early as 1990, the fact that TVA may have waited until 1993 to force him out is not dispositive, as the March 22, 1993 letter may have served as the last tolerable incident of protected activity.

I also reject TVA's argument that Bynum had no knowledge of Jocher's protected activity. Bynum, as TVA's Vice President of Nuclear Operations, received copies of all of NRC's Notices of violations, SCARS and LERS (Tr. 1432). All SCARS initiated by Jocher were signed by him as the "initiating supervisor" (CX 69, 75). I find Bynum's testimony that he did not have time to read the NRC notices non-persuasive, as he himself acknowledged that a SCAR is the most serious level of corrective action and garners the most attention from TVA management and the NRC (Tr. 1435). Furthermore, Bynum had an office at Sequoyah and spent one to two

days a week at the Plant. He was in constant communication with Jack Wilson (Sequoyah Vice President), who undoubtedly was aware of the corrective action reports filed by Sequoyah employees, especially the ones filed by Jocher because he occupied a high level position (PG-10). Also persuasive is the fact that Bynum was intimately involved in the discussions surrounding the decision to ask Jocher to leave TVA. Had Bynum been unfamiliar with Jocher's actions at Sequoyah, as TVA claims, he would not have played such a major role in seeking his resignation.

Finally, TVA argued that workers at their plants routinely engage in protective activity, as it is an encouraged practice and considered part of one's job. TVA noted that Jocher was not alone in initiating corrective action reports, as even before Jocher arrived at Sequoyah forty other LER's and 478 other corrective action documents such as SCARS and PERS had been filed by other TVA managers and employers (Tr. 1296-99, RX 23). Dr. Don Adams (Sequoyah's Chemistry Program Manager) testified that "a number of corrective actions [had been] filed and reported on the [Sequoyah chemistry] program to document weaknesses." (Tr. 1047). However, TVA's reliance on these numbers is misguided. Jocher's protected activity exposed long known but neglected problems at Sequoyah and was of a type that generated a higher level of concern with both TVA and the NRC. Jocher's protected activity was programmatic in nature, involving system wide defects rather than isolated incidents (Tr. 216-17, 667-69, 1437). While Jocher may not have been the first person to identify the problems at issue, he was the first person to initiate corrective action proceedings for them. By doing so, he overtly held senior TVA management responsible for neglecting to take corrective action on known problems. As such, Jocher's protective activity, rather than involving routine matters, is distinguishable from other types of protected activity because it drew an inordinate amount of unfavorable attention to TVA management.

Therefore, I find that the Complainant has established a prima facie case of discriminatory intent on behalf of the Respondent.

#### B. Rebuttal of the Prima Facie Case

Once a complainant satisfies his prima facie case, the burden shifts to TVA to produce evidence of the existence of a legitimate, non-discriminatory reason for the adverse employment action taken against a complainant. St Mary's Honor Center v. Hicks, 509 U.S. 502 (1993). To carry its burden, TVA must only produce evidence of some legitimate grounds for the April 5, 1993 forced resignation of the Complainant. It does not have to prove at this stage that it was actually motivated to seek Jocher's resignation because of the proffered reason. Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 254-55 (1981).

TVA presented evidence that its decision seek Jocher's resignation was based on Jocher's poor management style. I find that this proffered explanation constitutes a legitimate, non-discriminatory reason for the adverse action taken against him. Therefore, I find that TVA has successfully rebutted the Complainant's prima facie case.

C. Pretext

Once the respondent articulates a legitimate, non-discriminatory reason for seeking the complainant's resignation, the burden shifts back to the complainant to prove that the proffered legitimate reason is a mere pretext rather than the true reason for the challenged employment action. Burdine, 450 U.S. at 236; Carroll v. United States Dept. of Labor, 78 F.3d 352 (8th Cir. March 5, 1996); Zinn, 93-ERA-34 and 36. The complainant may demonstrate pretext by showing that discrimination was more likely the motivating factor or by showing that the proffered explanation is not worthy of credence. The proof must go beyond disbelief of the respondent - the factfinder must believe the complainant's explanation of intentional discrimination. St Mary's Honor Center, 509 U.S. at 509; Frady v. Tennessee Valley Authority, 92-ERA-19 and 34 (Sec'y October 23, 1995).

As evidence that their decision to ask for Jocher's resignation was not pretextual, TVA cites to Jocher's poor management style, arguing that their decision was a business one, not subject to challenge. TVA points to Jocher's inability to get along with co-workers and supervisors, his behavior during meetings, and improper testing of Sequoyah personnel as evidence of Jocher's poor management style.

Jocher's inability to get along with his co-workers is the most frequently cited example of his poor managerial style. Undoubtedly, Jocher's managerial skills were weaker than his technical skills. However, Jocher arrived at Sequoyah knowing that he had only one year to improve the embattled chemistry program and took an aggressive, often combative approach in accomplishing that task.<sup>34</sup> With the exception of John Sabados, Jocher's problems with his co-workers amounted to a series of isolated incidents. As noted in the Findings of Fact, Jocher's quarrels with Betsy Eiford Lee, Jill Wallace, Don Adams, David Sorrelle and Sam Harvey are best described as petty and are not unusual for a high pressured

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<sup>34</sup> Indeed, TVA management impressed upon Jocher the need to "put his money where his mouth was" when they sent him to Sequoyah (ALJX 39).



work setting such as TVA.<sup>35</sup> Jocher's problems with Sabados were largely rooted in technical disagreements that became personal. After meeting with McArthur and Max Herrel, Jocher pledged to get along better with Sabados and did. As much as Jocher had problems with co-workers at TVA corporate and Sequoyah, numerous other co-workers testified that they got along fine with Jocher and had no problems with his managerial style. Donald Matthews testified that Jocher got along well with other team members and behaved professionally during staff meetings (Tr. 768-771, 778). Charles Hudson testified that he had a good relationship with Jocher (Tr. 512-13). James Barker testified that he got along well with Jocher and was happy with the progress made at TVA corporate during Jocher's tenure (Tr. 475).

The incident involving Jocher's testing of Sequoyah technicians fails to defeat the complainant's pretext argument. While the test may have upset some of the technicians because they were told to include their names, the language in the NSRB directive for administering the test implied that it was not to be given anonymously (Tr. 954-55, RX 20). As well, despite allegations that the Jocher-administered test did not properly test the technicians' knowledge and asked improper follow-up questions, the results of TPEC's retest were similar to the results of the Jocher-administered test (ALJX 39, Tr. 1505).

Nor do Jocher's ill-advised comments during the TVA/NRC meeting mitigate a finding of pretext. The meeting was an isolated incident and did not pertain to Jocher's management style. Besides, TVA's decision to seek Jocher's resignation was not dependent on the incident (Tr. 1468-69). Similarly, Jocher's less than honest portrayal of his educational background and unsupported account of his handling of the oil spill at Sequoyah pertain more to his credibility than his managerial style.

Also significant is the fact that TVA's claim of poor managerial style as a reason for seeking his resignation is not supported by Jocher's two performance evaluations. Jocher's first performance review, which covered most of his tenure at TVA corporate, was favorable. The report read that Jocher met all of his goals in a timely, professional manner and had established credibility and a "good team relationship" with the corporate and site organizations (CX 12). The report also noted that Jocher established a rapport with site managers and provided leadership

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<sup>35</sup> Jocher was not the only worker at TVA to have difficulty with co-workers. David Goetcheus became irate with James Mullenix on at least one occasion, prompting Mullenix to file an employee concern report (Tr. 1564-68). Concerning Jocher's tenure at TVA corporate, James Barker testified that tension between corporate and site staffs had always been common (Tr. 488-494).

and technical direction to corporate and site management. The second performance evaluation, covering the remainder of Jocher's term at TVA corporate and half of his term at Sequoyah, was equally favorable. The report stated that Jocher had made significant progress on the Chemistry Improvement plan, that he approached work as a member of Sequoyah's team, and had established high standards for himself and his department. The report commended Jocher for his positive approach, commenting that he has a "run-it-like-it-was-our-own business attitude which had been missing in the chemistry department." (CX 14). The performance evaluations were written prior to any claim being filed in this case and represent unbiased accounts of Jocher's performance at TVA and are accorded substantial weight.

Besides the performance evaluations, the record evidences other accomplishments of Jocher supporting the Complainant's contention that TVA's claim of poor managerial style was a pretext for discrimination. During his first year at TVA, Jocher received at \$3,800.00 bonus. While at TVA corporate, Jocher promoted the adoption of a hydrogen water chemistry plan at Browns Ferry, recommended a treatment plan for Browns Ferry's main surface condenser, and developed a corporate chemistry manual to promote uniformity across the site chemistry programs. (Tr. 61, 71, ALJX 39, CX 173). His efforts to promote the adoption of the hydrogen water chemistry plan proved successful and many of his ideas were well received by TVA management. Upon moving to Sequoyah, Jocher instituted numerous accountability measures to improve the chemistry program; monthly chemistry reports documented a reduction in the amount of reported errors (CX 55D-J). A February 1993 external review of Sequoyah's chemistry program by TVA's NSRB noted significant progress (ALJX 39).

Documented negative comments of Jocher's performance were few. Jocher's first performance evaluation noted that he needed to place additional emphasis on delegation and meeting administrative commitments (CX 12). McArthur wrote in Jocher's second performance review that Jocher's "support with others sometimes requires work" and that he did not "desire to work with those he assumes to be unqualified." (CX 14, ALJX 39). Finally, NSRB's February 1993 external review also noted that there were still problems with basic housekeeping, data recording and labeling of some materials in the chemistry laboratory - problems that existed prior to Jocher's arrival at Sequoyah (ALJX 39). These comments do not evidence a significant degree of managerial shortcomings, especially when viewed in light of the numerous favorable comments.

Furthermore, if TVA was troubled by Jocher's managerial performance, they failed to adequately notify him of their concerns. TVA contends that they counseled Jocher on numerous occasions about the need to improve his attitude toward his co-workers. However, the record evidences only four instances over a two year period where McArthur spoke to Jocher about the need to

improve his relationships with his co-workers. Rather than qualifying as formal counseling, as TVA contends, McArthur's talks with Jocher were informal, better characterized as passing comments. As such, I am unwilling to endorse TVA's argument that they repeatedly counseled Jocher about the need to improve his managerial skills.

Further evidence that TVA's decision to seek Jocher's resignation was pretextual are Bynum's, Keuter's and McArthur's inconsistent and conflicting accounts of the events surrounding Jocher's departure. It has been held that an employer's shifting explanations may be considered evidence of pretext. Hobby v. Georgia Power Co., 90-ERA-30 (Sec'y August 4, 1995), citing Bechtel Constr. Co. v. Secretary of Labor, 50 F.3d 926, 935 (11th Cir. 1995). Noted discrepancies included the following: (1) Keuter and McArthur told TVA OIG that at the first meeting all three managers (Bynum, Keuter, McArthur) agreed to a six month improvement plan; Bynum told TVA OIG that he knew nothing of a six month improvement plan (CX 113B, 126B, 129B); (2) Keuter and McArthur told TVA OIG that at the second meeting Bynum decided to abandon the six month program and that Bynum alone wanted Jocher removed; Bynum told TVA OIG that the decision to remove Jocher was a consensus. Id.; (3) Bynum told TVA OIG that TVA downsizing, coupled with Keuter's and McArthur's desire to hire Gordon Rich, was a factor in asking Jocher to leave; both Keuter and McArthur told TVA OIG that downsizing was not discussed at the meeting. Id. Attempts at the hearing to reconcile the discrepancies failed to diminish the suspicions raised by the previous inconsistent and conflicting accounts.<sup>36</sup>

I find that the reasons given by TVA in seeking Jocher's resignation are primarily pretextual, unrelated to poor managerial style.

Once evidence of a pretext has been established the complainant must still demonstrate that the adverse employment action was linked to his protected activity. Bryant v. Bob Evans Trans., 94-STA-24 (Sec'y April 10, 1995). Proving that the proffered reason was unbelievable does not compel a finding for the complainant. Rather, the trier of fact must find intentional discrimination in order for the complainant to prevail. Leveille v. New York Air Nat'l Guard, 94-TSC-3 and 4 at 7-8 (Sec'y December 11, 1995). Nonetheless, rejection of the respondent's reasons, particularly if the rejection is accompanied by a suspicion of mendacity, may,

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<sup>36</sup> TVA elicited testimony from Bynum that it was very common for TVA managers to be removed from their positions (Tr. 1408-09). However, many are reassigned to other positions within TVA (Tr. 973-74). When TVA told Jocher that he was no longer needed, his request to be transferred from nuclear to fossil was denied (Tr. 302).

together with the elements of the prima facie case, suffice to show intentional discrimination; no additional proof of discrimination is required. Bechtel, 50 F.3d 926.

Relying on the Bechtel holding, a review of my prima facie and pretext discussions provides sufficient proof that TVA's decision to seek Jocher's resignation was in fact related to his protected activity. While the examples cited may be classified as circumstantial, the presence of retaliatory motive is a legal conclusion and is provable by circumstantial evidence. Ellis Fischel State Cancer Hosp. v. Marshall, 629 F.2d 563, 566 (8th cir. 1980), cert. denied, 450 U.S. 1040 (1981). Jocher's protected activity exposed programmatic defects at Sequoyah and placed unfavorable attention on TVA management. Indeed, evidence adduced at the hearing revealed that some members of TVA management were upset with Jocher's actions.<sup>37</sup> Bynum's decision to abandon the six month improvement plan soon after learning that TVA was preparing to investigate Jocher's on-line instrumentation SCAR is suspect as the timing is too coincidental. The discrepancies associated with the interviews that Bynum, Keuter and McArthur had with the TVA OIG strongly suggest that TVA management was concealing the real reason for seeking Jocher's resignation. A finding of retaliatory intent can be supported when an employer's witnesses testimony was inconsistent and evasive and evidenced an intent to obfuscate the facts. Cook v. Guardian Lubricants, Inc., 95-STA-43 (Sec'y May 1, 1996). Jocher's advanced technical skills, as evidenced by his two favorable performance evaluations and accomplishments at both TVA corporate and Sequoyah, were such that he was valuable to TVA. That TVA chose to seek the resignation of a person as qualified and valuable as Jocher for perceived managerial problems, with no attempt at reassignment, begs a finding of discriminatory animus.<sup>38</sup> Therefore, I find that TVA's decision to seek Jocher's resignation was linked to his protected activity.

TVA's reason for seeking Jocher's resignation was primarily pretextual and linked to his protected activity. Nonetheless, TVA

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<sup>37</sup> Charles Kent testified that he believed Jocher's initiation of the corrective action reports was designed to draw attention to the problems at Sequoyah's chemistry program so that TVA management would devote more financial resources to the program, thereby allowing Jocher to meet his goals (Tr. 1308-09, CX 125). Patrick Lydon said that both Bynum and Robert Beecken (Sequoyah's Plant Manager) were unhappy with Jocher's initiatives (Tr. 587-88, 601, 612).

<sup>38</sup> Contrary to TVA's assertion, the propriety of their decision to seek Jocher's resignation is subject to scrutiny. See Adams v. Coastal Prod. Op, Inc., 89-ERA-3 at 11 (August 5, 1992); see also Poque v. United States Department of Labor, 940 F.2d 1287, 1291 (9th Cir. 1991).

sufficiently demonstrated that Jocher possessed poor managerial skills, which, by itself, would be a legitimate reason for seeking his resignation. This gives rise to a dual motives analysis.

#### D. Dual Motive

The dual motive test requires that when both discriminatory and non-discriminatory reasons for the adverse employment action have been presented, the respondent must demonstrate by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of protected activity. Mount Healthy School Dist. v. Doyle, 429 U.S. 274 (1977); Dysert v. Florida Power Corp., 93-ERA-21 (Sec'y August 7, 1995); Dartey v. Zack Co. of Chicago, 82-ERA-2 at 6-9 (Sec'y April 25, 1983). The application of the clear and convincing standard represents a change in the law. The Comprehensive National Energy Policy Act of 1992 raised the burden of proof for the respondent in a dual motives analysis in an ERA whistleblower case from a preponderance of the evidence to clear and convincing evidence. 42 U.S.C. §5851(b)(3)(D); Yule v. Burns Int'l Security Serv., 93-ERA-12 (Sec'y May 24, 1995). The Secretary has noted that while there is no precise definition of "clear and convincing evidence," the courts recognize that it is a higher burden than "preponderance of the evidence" but less than "beyond a reasonable doubt." See Grogan v. Garner, 498 U.S. 279, 282 (1991); Pacific Mutual Life Ins. Co. v. Haslip, 499 U.S. 1, 22 n.11 (1991). The existence of a legitimate reason for the taking of an adverse employment action against a complainant does not, by itself, carry a respondent's burden in a dual motives analysis. Rather, the record must establish that the respondent would have taken the action for the legitimate reason alone. See Martin v. Department of the Army, 93-SDW-1 (Sec'y July 13, 1995).

The Respondent has failed to demonstrate by clear and convincing evidence that Jocher's poor management style was the sole reason for seeking his resignation. As discussed supra, Jocher possessed advanced technical skills and was a valuable employee to TVA. The problems he had with some of his co-workers were not disruptive to the point where it was necessary to ask him to leave. Simply put, had Jocher not engaged in protected activity TVA management undoubtedly would have overlooked his managerial inadequacies, probably working with him to improve those skills. Indeed, TVA was prepared to do this until Joseph Bynum abruptly abandoned the six month improvement plan after learning of the NRC's intention to investigate Jocher's on-line instrumentation SCAR. Therefore, I find that the respondent failed to satisfy the dual motives burden.

#### VI. CONCLUSION

The Respondent, Tennessee Valley Authority, violated Section 210 of the Energy Reorganization Act.

VII. DAMAGES, ATTORNEY FEES AND COSTS

In order to determine the amount of backpay, attorney fees and other costs, the Complainant, through counsel, shall file, within thirty (30) days of this Recommended Decision and Order, the following information with this Office with proof of service on the Respondent: (1) A documented list of all claimed backpay, damages and other costs which he is claiming by virtue of his termination of employment from TVA; (2) A documented fee petition and bill of costs; and (3) A list of any income which would constitute offsets to the above.

Respondent will then have twenty (20) days thereafter to file any comments and/or objections with this Office. Thereafter, a supplemental Order for fees and costs will issue.

VIII. RECOMMENDED ORDER

Accordingly, it is hereby recommended that an ORDER be issued by the Secretary of Labor providing that the Tennessee Valley Authority is to pay to Complainant all damages plus costs and expenses, including attorney fees, reasonably incurred in connection with the bringing of the complaint upon which this recommended order is issued, such as may be approved by the Secretary upon issuance of the Supplemental Recommended Decision and Order.

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ROBERT L. HILLYARD  
Administrative Law Judge

**NOTICE:** This Recommended Decision and Order and the administrative file in this matter will be forwarded for final decision to the Administrative Review Board, United States Department of Labor, Room S-4309, Francis Perkins Building, 200 Constitution Ave., N.W., Washington, DC 20210. See 61 Fed. Reg. 19978 and 19982 (1996).